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ConocoPhillips Alaska, Inc.

February 6, 2006

VIA ELECTRONIC MAIL

NEPA Draft Report Comments
c/o NEPA Task Force
Committee on Resources
1324 Longworth House Office Building
Washington, D.C. 20003
ELECTRONIC MAIL: nepataskforce@mail.house.gov

Re: Comments on NEPA Reform Recommendations

Dear Committee on Resources NEPA Reform Task Force:

ConocoPhillips Alaska, Inc. (CPAI) respectfully submits these comments on the NEPA Task Force's *Initial Findings and Draft Recommendations* dated December 21, 2005 ("*NEPA Report*").

By way of introduction and background, CPAI is a wholly-owned Alaskan subsidiary of ConocoPhillips Company. CPAI has been a major participant in the exploration, development and production of oil and gas in Alaska since before statehood. CPAI is the #1 oil and gas producer in Alaska and is also a leader in exploration for oil and gas in Alaska. On the North Slope of Alaska, CPAI is a majority owner of the Prudhoe Bay oilfield and the operator of both the Kuparuk and Alpine oilfields. On a daily basis, CPAI transports over one-third of all the crude oil shipped through the Trans-Alaska Pipeline System (TAPS). CPAI also operates the Kenai LNG (liquefied natural gas) Plant, the offshore Tyonek natural gas platform, and the Beluga natural gas field in the Cook Inlet area.

Because of the national prominence of North Slope oil and gas exploration and development, and because of the scale of major oil and gas exploration and development projects, CPAI has substantial, long-term and virtually daily experience with NEPA process. We have been active participants in NEPA review of both programmatic and project-specific proposed actions conducted under the auspices, or with the active involvement, of the U.S. Bureau of Land Management ("BLM"), the U.S. Army Corps of Engineers ("Corps"), the U.S. Environmental Protection Agency ("EPA"), the U.S. Coast Guard ("USCG"), the U.S. Fish & Wildlife Service ("FWS"), the National Marine Fisheries Service ("NMFS"), the Minerals Management Service (MMS), the State of Alaska, the North Slope Borough and numerous tribal and native interests. It is not uncommon in our experience for NEPA processes to include all or nearly all of these

federal, state, local and native entities, as well as to attract significant attention and involvement from national conservation advocacy groups.

Although the *NEPA Report* provides some statistical information indicating that NEPA litigation is uncommon, our experience is to the contrary. There have been few proposed oil and gas related developments or federal lease sales in Alaska, and specifically the North Slope, in the last ten years that have not involved NEPA litigation and none that have taken place without serious threat of NEPA litigation. In fact, CPAI is either a party to or in the process of intervening in three NEPA lawsuits currently pending in federal district or appellate courts.[1]

CPAI sincerely appreciates your consideration of the comments provided below. In Section I, we have provided comments specific to each of the draft recommendations in numerical order. Because our comments are in numerical order, we want to emphasize that we feel most strongly about our comments regarding Recommendations 1.2 (create timeframes), 4.1 (create citizen suit provision), 5.3 (make mitigation mandatory) and 8.1-.2 (clarify meaning of cumulative impacts). In Section 2 and related attachments, we have provided a limited number of specific alternative recommendations that are supported by information already provided to the NEPA Task Force.

Again, thank you for the opportunity to provide comments on the U.S. House of Representatives Committee on Resources draft NEPA Reform Recommendations. If you have questions concerning these comments, please contact me at (907) 263-4682 at your convenience.

Sincerely,

Kenneth L. Donajkowski

Vice President
Health, Environment & Safety
ConocoPhillips Alaska, Inc.

cc:

[1] The three pending cases are: *Wilderness Society v. Norton* (No. 98-2395, D.D.C.), *Northern Alaska Environmental Center v. Norton* (No. 05-35085, 9th Cir.) and *National Audubon Society v. Norton* (Case No. J05-008 CV, D. Alaska).

CONOCOPHILLIPS ALASKA, INC.
COMMENTS ON NEPA REFORM DRAFT RECOMMENDATIONS

I. Comments on Draft Recommendations

Recommendation 1.1: Under current law, the phrase "major federal action" has essentially no consequence independent of the term "significantly." *See* 40 C.F.R. § 1508.18 ("Major reinforces but does not have a meaning independent of significantly (§ 1508.27)."). Accordingly, under current law, NEPA process is generally applied to actions that "may" cause significant degradation of the human environment. If it is clear from the preparation of an Environmental Assessment ("EA") that the probable environmental impacts are not significant, then the NEPA process is concluded with a Finding of No Significant Impact ("FONSI"). If there are substantial questions as to whether a project may cause significant environmental impacts, then an Environmental Impact Statement ("EIS") is prepared.

From ConocoPhillips Alaska's perspective, the term "major federal action" does not pose any new burdens on the process, is not unclear and does not contribute to delay or to litigation. Indeed, we can think of no example in our experience where this term became the focus of a regulatory problem for us, or was the subject of NEPA litigation involving our projects. Thus, Recommendation 1.1 does not appear to address an important existing problem with NEPA. To the contrary, we think that a new definition of "major federal action" would invite litigation in an area where there now is none, thereby leading to additional delays and cost burdens on project applicants. For these reasons, we discourage the NEPA Task Force and the Committee on Resources from pursuing Recommendation 1.1.

Recommendations 1.2 and 2.2: Based upon our experience, we strongly support the policy rationale underlying Recommendations 1.2 (to establish mandatory timelines) and 2.2 (to codify EIS page limits). However, despite this support, we do not think that either of these recommendations is workable as proposed.

Viewed pragmatically, one of the serious issues that plagues the current NEPA process is a lack of **schedule discipline**. In our experience, lead agencies often do not see establishing a schedule and holding to it as a NEPA priority. Even worse, some agencies perceive schedule discipline as antithetical to a rigorous public review process. In some notable instances, our experience has been that where the lead agency develops and sticks to a set schedule, cooperating agencies with different agendas become resistant to the schedule to the point of belligerence. This was the case in the recent Alpine Satellite Development Plan ("ASDP") EIS (Sept. 2004), for which the BLM was the lead agency. BLM established and kept to an 18-month NEPA schedule for the ASDP EIS, which resulted in significant rancor between BLM and cooperating agencies.

Recommendation 1.2 would establish a 9 month timeline (subject to a 3 month extension) for EAs and an 18 month timeline (subject to a 6 month extension) for an

EIS. The approach proposed would allow the CEQ to grant extensions. Analyses not concluded by the expiration of these timeframes would be "considered completed." Unfortunately, terminating the NEPA process without a complete document will make it easy for project opponents to convince a court to invalidate the underlying federal action. This unintended outcome is assured because the imposition of fixed timeframes is not related to well-established legal standards for determining the adequacy of the NEPA process or a NEPA document. Therefore, as proposed, Recommendation 1.2 would be unworkable and counterproductive. Similarly, while ConocoPhillips Alaska is sympathetic to reducing the size of NEPA documents,[2] imposing page limits, such as those suggested in Recommendation 2.2, without changing the requirements of a NEPA analysis, is more likely to expose NEPA documents to judicial challenge and invalidation than to accomplish successful NEPA reform.

An alternative approach to establishing effective schedule discipline is outlined in detail in Section II of our comments. As suggested there, the Endangered Species Act's ("ESA's") concept of "applicant" status is useful to consider as a means of addressing several NEPA concerns. *See* 16 U.S.C. § 1536 (describing role of applicants in § 7 consultation process). An "applicant" under the ESA is any person "who requires formal approval or authorization from a Federal agency as a prerequisite to conducting the action." 50 C.F.R. § 401.02. Recognizing the reasonableness and the benefits of closely involving applicants in federal review processes concerning their projects, ESA regulations expressly grant applicants certain procedural rights, including the ability to block unlimited extensions of the consultation timeframes established by regulation. Accordingly, under the ESA, the consulting agency cannot extend the prescribed timeframe for consultations without providing the applicant with written notice of the reasons for the extension and cannot extend the timeframe beyond an additional 60 days without the applicant's concurrence. 50 C.F.R. §§ 402.14(e), (g)(5).

With this precedent in mind, a more effective amendment to NEPA and/or its regulations would (1) establish fixed timeframes, such as those suggested in Recommendation 1.2, (2) allow the lead agency to extend the timeframes by modest amounts with notice and written explanation to the applicant (*i.e.,* up to 60 days for an EIS and up to 30 days for an EA) and, (3) require applicant concurrence in any further timeframe extensions. This approach neither binds the agency to a timeframe that cannot be met if there are legitimate reasons, nor grants the agency unfettered discretion to draw out the NEPA process.

It is also worth observing that the concept of applicant status in programmatic ESA consultations is applied flexibly in a manner that provides a useful model for programmatic NEPA reviews. Under the ESA, users of public resources (*e.g.*, oil and gas lessees on federal lands) are not automatically considered "applicants" in a programmatic consultation dealing with land management planning. These same users would, however, be applicants in the discrete actions through which they seek federal approvals (*e.g.*, an application for exploration or development drilling). The same could

[2] For example, Volume I alone of the ASDP EIS is nearly 800 pages in length.

be true if applicant status were created for NEPA processes – that is, NEPA, or its regulations, could be amended to grant resource users applicant status as of right in discrete project reviews, while giving agencies discretion to award applicant status in programmatic NEPA reviews.

Recommendation 1.3: Although we do not see it as a major NEPA issue, ConocoPhillips Alaska agrees with Recommendation 1.3 insofar as it suggests that an effort be made to encourage the use of categorical exclusions ("CEs") for temporary activities or other activities that clearly have minimal environmental impacts. We do not believe that it is necessary to amend NEPA for this purpose. However, under current practice CEs are very underutilized and poorly defined by federal agencies.

Recommendation 1.4: ConocoPhillips Alaska does not support Recommendation 1.4, which suggests amending NEPA to codify the criteria for supplemental NEPA reviews. Currently, the criteria for supplementing a NEPA review are set forth by regulation. In 40 C.F.R. § 1502.9(c)(1), the regulations establish the need to supplement a NEPA document when substantial changes are made to the proposed action or there are significant new circumstances or information relevant to environmental impacts. We are not aware of significant abuse of these criteria; nor is it apparent why codifying these requirements would create greater certainty than now results from the regulation as it has been promulgated. However, 40 C.F.R. § 1502.9(c)(2), does provide agencies with the discretion to engage in supplemental NEPA review "when the agency determines that the purposes of the Act will be furthered by doing so." Although we are not aware of abuses of NEPA process attributable to this subsection, the regulation confers upon agencies an essentially unfettered and unreviewable right to engage in supplemental NEPA analysis where the proposed project has not been modified and where there is no significant new information. The Task Force should therefore recommend repealing 40 C.F.R. § 1502.9(c)(2).

Recommendation 2.1: ConocoPhillips Alaska opposes Recommendation 2.1, which suggests adoption of a regulation giving preferential weight to "localized comments." In our experience, federal agencies use their expertise and best judgment to weight comments according to their merit and the amount of detailed evidence that supports the comments. Thoughtful comments from persons with professional expertise or important local knowledge are, of course, given more weight than non-specific or computer generated comments. Just as the introduction to the Task Force's invitation to comment on its recommendations states that "[t]he quality, not the volume, of the comments is critical," our experience in NEPA processes is that federal agencies are very capable of focusing on the quality of the comments they receive, and not on the volume or on the locality of the source of the comment.

This is as it should be. It would be antithetical to NEPA to create a bias in favor of potentially thoughtless local commentary over highly pertinent information submitted by a distantly located knowledgeable person or entity. Moreover, we think determinations of what comments are locally-sourced and what comments are distantly-

sourced, and what effect these determinations may have on a NEPA review process, is an unnecessary invitation to argument and litigation.

Recommendation 2.2: See our comments above regarding Recommendation 1.2.

Recommendations 3.1 and 3.2: In Alaska, the involvement of State, local and tribal interests is well-provided for through current NEPA processes. NEPA reviews in Alaska often include the State of Alaska and the North Slope Borough as cooperating entities, and document extensive government-to-government consultations with recognized tribes and native interest groups. In sum, ConocoPhillips Alaska's experience does not support a need for further or formalized participation rights by State, local or tribal interests, as suggested in Recommendation 3.1.

ConocoPhillips Alaska takes no direct position on Recommendation 3.2, which suggests that CEQ prepare regulations allowing state environmental review processes to satisfy NEPA. The State of Alaska does not have an analog to NEPA and, accordingly, such a change would not have a current impact on Alaskan activities. Nevertheless, we do observe that a federally-managed NEPA process is a fundamental requirement of NEPA. We can easily imagine problems ensuring (and litigation over) the equivalence of a state environmental review process as well as the concurrence of federal cooperating agencies in the selection of a preferred alternative when the environmental review is conducted by a state entity. For similar reasons, we can see the opportunity for argument and delay in the selection of a lead agency when the choice is up for federal or state grabs.

Recommendation 4.1: Recommendation 4.1 suggests amending NEPA to include a citizen suit provision. Although there are aspects of this recommendation that are useful to consider, ConocoPhillips Alaska strongly opposes the citizen suit provision described in this recommendation.

Initially, we observe that citizen suit provisions are a statutory tool used by Congress as a means of expanding access to judicial review. In contrast, the citizen suit provision described in Recommendation 4.1 is apparently designed to narrow who has standing to bring NEPA challenges, and to raise the bar for a successful challenge to a NEPA process. The contradiction between the apparent narrowing intent of the provision here and the general usage of citizen suit provisions to expand judicial access is good reason for concern and, we think, bound to lead to confusion and unpredictable court interpretations.

Under current law, it is well-established that a NEPA challenge must be brought as a claim under the federal Administrative Procedure Act ("APA"). *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). It is equally well-established that APA review is conducted on the administrative record, and that a highly deferential standard of review applies with a presumption of valid agency action. 5 U.S.C. § 706(2)(A); *see, e.g., Westlands Water District v. Department of Interior*, 376 F.3d 853, 865 (9th Cir. 2004).

Given that there is a recognized cause of action under the APA, and given the large body of favorable case law on the APA's deferential standard of review, addition of a citizen suit provision would not lead to greater clarity or certainty. Instead, the proposed provision would generate years of litigation which could result in a standard of review less deferential to the agency and an expansion of the relevant evidence beyond the administrative record. If so interpreted, the proposed citizen suit provision would not only undermine the validity of NEPA process, it would increase costs and delays caused by NEPA litigation. We firmly believe that all stakeholders in NEPA processes are better off with the established parameters of thirty years of NEPA and APA jurisprudence, than with the creation of a new and uncertain citizen suit cause of action under NEPA.

Recommendation 4.1 includes the suggestion that appellants (*i.e.*, the party challenging the NEPA decision) be required to demonstrate that the NEPA evaluation "was not conducted using the best available information and science." This concept is deeply flawed. We presume that the intended purpose of including a "best available information and science" requirement is to raise the bar for those challenging NEPA decisions. However, NEPA does not currently require agencies to use the best available information and science. Consequently, it makes no sense to demand that appellants prove that federal agencies failed to meet a standard to which the agencies themselves are not held. Moreover, while it makes good sense to hold agencies making substantive environmental decisions to a best science standard, NEPA is an entirely procedural statute (*see* comments regarding Recommendation 5.3, below). It is entirely uncertain what the functional significance of a best science standard would be in the context of NEPA's procedural structure.

Despite our opposition to the creation of a citizen suit provision, there are aspects of Recommendation 4.1 that ConocoPhillips Alaska supports. It is suggested that NEPA challenges be limited to 180 days after notice of a final decision. We support this concept. The general statute of limitations applicable to APA challenges is six years. Although we have not encountered actual problems with NEPA challenges filed years after the fact, in the context of NEPA, six years is unreasonably long. There is precedent for limiting the applicable statute of limitations for APA actions filed to challenge agency action. *See, e.g.,* 16 U.S.C. § 1855(f)(1) (limiting challenges to fisheries regulations issued under the Magnuson-Stevens Act to 30 days from the date of promulgation); 42 U.S.C. § 6508 (requiring NEPA challenges to oil and gas leasing in the National Petroleum Reserve-Alaska be filed within 60 days of the final EIS).

Recommendation 4.1 also includes a suggestion that the federal agency (and the Department of Justice) be prevented from settling NEPA challenges without the involvement of affected businesses and individuals not party to the litigation. While this concept, as described, strikes us as unworkable in practice, we think that amending NEPA to incorporate the concept of an applicant party with certain procedural rights, including an established right of intervention in a NEPA challenge to the applicant's project, would fairly and effectively accomplish the intent of this aspect of

Recommendation 4.1. *See* § II below (discussing "applicant" and intervention concepts).

Finally, Recommendation 4.1 is apparently intended to narrow the range of potential plaintiffs able to bring a NEPA challenge. Given the broad and generally inclusive public involvement required by NEPA itself, we are skeptical that there is either a one-size-fits-all or politically viable way to statutorily restrict the standing of those who may want to file a NEPA action. Moreover, NEPA case law already requires plaintiffs to participate in the administrative process and exhaust their administrative remedies prior to bringing a NEPA challenge in federal court. *See*, *e.g., Dep't of Transp. v. Pub. Citizen*, 541 U.S. 753, 764 (2004).

Recommendation 4.2: We are unable to match up the title of Recommendation 4.2, which suggests agencies be required to "pre clear" projects, with the text that follows. We do not understand what pre-clearance requirement is contemplated and no explanation is provided. The text following the title recommends that CEQ provide a clearinghouse and monitoring function that it can, and at least to some extent, does provide. In any event, these matters do not address key NEPA reform issues.

Recommendation 5.1: ConocoPhillips Alaska supports the concept embodied in Recommendation 5.1 of clarifying the range of reasonable alternatives that must be considered during the NEPA process. However, we believe there is a very simple and effective way to amend existing regulations to accomplish this purpose.

Currently, NEPA directs federal agencies to "study, develop, and describe appropriate alternatives to recommended courses of action." 42 U.S.C. § 4332(2)(E); 40 C.F.R. § 1502.14. In interpreting this provision, courts have repeatedly held that agencies "'need not consider an infinite range of alternatives'" but are only required to examine "'those alternatives necessary to permit a reasoned choice.'" *Westlands Water District v. Department of Interior*, 376 F.3d 853, 868 (9th Cir. 2004). Moreover, courts have held that the choice of alternatives is "bounded by some notion of feasibility," meaning that an agency is not required to consider alternatives whose implementation is "remote," "speculative," "ineffective" or "inconsistent" with basic policy objectives. *Westlands Water District*, 376 F.3d at 868; *Headwaters, Inc. v. Bureau of Land Management*, 914 F.2d 1174, 1180-81 (9th Cir. 1990).

Notwithstanding these principles, in our experience, significant administrative effort is devoted to coming up with a range of alternatives, and NEPA challenges premised upon the failure of an agency to consider some form of alternative action are common. We believe the existing problem is attributable to language in 40 C.F.R. § 1502.14(b), which interprets NEPA to require agencies to "rigorously explore and objectively evaluate all reasonable alternatives." Courts and agencies have struggled to harmonize the phrase "all reasonable alternatives," particularly the word "all," with commonsense notions of examining a reasonable, but not infinite, range of alternatives. In our experience, project opponents frequently seek to exploit this uncertainty.

From our perspective, considerable clarity can be accomplished by amending 40 C.F.R. 1502.14(b) to delete the phrase "all reasonable alternatives" and replace it with the phrase "a reasonable range of alternatives." Additional clarity may be accomplished by including existing judicial notions of feasibility in 40 C.F.R. § 1502.14. Accordingly, § 1502.14 might be amended to expressly state that the reasonable range of alternatives does not include remote, speculative, ineffective, inconsistent or unsupported alternative actions.

Recommendation 5.2: ConocoPhillips Alaska does not support Recommendation 5.2, which suggests amending NEPA to clarify that an EIS must analyze a "no action" alternative. Current and long-standing NEPA regulations already require analysis of a no action alternative. 40 C.F.R. § 1502.14(d). We are aware of no instance where an agency has failed to consider the "no action" alternative or where a court has failed to require such an analysis.

Recommendation 5.3: ConocoPhillips Alaska opposes Recommendation 5.3. The Task Force report suggests that there is a live debate as to whether NEPA is a substantive environmental protection statute or a federal procedural statute that provides no independent authority for imposition of substantive requirements. *See, e.g., NEPA Report* at 8-9. Although the Task Force report does not purport to resolve this debate, Recommendation 5.3 would impose new substantive requirements by directing CEQ to promulgate regulations to make mitigation proposals mandatory and binding commitments.

Contrary to the implications of the Task Force report and comments it may have received, the strictly procedural nature of NEPA is settled law.

> The sweeping policy goals announced in § 101 of NEPA are thus realized through a set of "action-forcing" procedures that require that agencies take a "'hard look" at environmental consequences, (citation omitted), and provide for broad dissemination of relevant environmental information. Although these procedures are almost certain to affect the agency's substantive decision, **it is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process**. (Citations omitted). If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs. . . . **Other statutes may impose substantive environmental obligations on federal agencies, but NEPA merely prohibits uninformed – rather than unwise – agency action**.

Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989) (emphasis added). The procedural nature of NEPA does not diminish its importance in requiring a thoughtful and reasonably thorough public analysis of a federal action's probable environmental impacts. Nevertheless, the lack of substantive environmental protection

authority in NEPA is among the most fundamental and important limitations on the scope of NEPA.

It is equally clear, given NEPA's procedural nature, that Congress did not authorize federal agencies to use NEPA to impose binding mitigation requirements. Based upon the facts and record of each case, an EIS must identify and discuss possible mitigation measures in sufficient detail to ensure that the environmental consequences of a proposed action have been fairly evaluated. However, because NEPA procedure is only intended to ensure a sufficiently detailed analysis of environmental consequences, the adequacy of NEPA process is not measured by the enforceability of the mitigation measures that may be identified and discussed. As the U.S. Supreme Court has explained:

> There is a fundamental distinction…between a requirement that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated…and a substantive requirement that a complete mitigation plan be actually formulated and adopted… . [I]t would be inconsistent with NEPA's reliance on procedural mechanisms – as opposed to substantive, result-based standards – to demand the presence of a full developed plan that will mitigate environmental harm before an agency can act.

Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 352-353 (1989).

Under these circumstances, adopting a regulation requiring federal agencies to impose binding mitigation measures on project applicants, as suggested in Recommendation 5.3, would contradict the statutorily prescribed procedural nature of NEPA. Furthermore, because a substantive mitigation requirement would unquestionably exceed the authority granted by Congress in NEPA, any such CEQ regulation would be invalid.

Recommendation 6.1: ConocoPhillips Alaska opposes Recommendation 6.1, which proposes the establishment of new requirements requiring formal consultation with interested parties. The EIS process currently provides meaningful opportunities for public comment and engagement. These opportunities include scoping meetings, submission of written comments on a draft EIS, possible hearings on the draft EIS and submission of comments on the final EIS in advance of a final agency decision on the proposed action. This level of public involvement is fundamental to NEPA, uniquely rigorous and studiously enforced in judicial review. Under these circumstances, there is no need to add additional formal consultation requirements. Moreover, doing so would slow down a lengthy process that already lacks schedule discipline.

Recommendation 6.2: ConocoPhillips Alaska has never experienced difficulty arising from application of 40 C.F.R. § 1501.5 regarding selection of a lead agency. The flexibility that currently exists regarding such selection appears to us to be

warranted and useful. There does not appear to be any advantage or benefit to be gained from codifying or changing existing practice.

Recommendation 7.1: Recommendation 7.1 proposes creation of a "NEPA Ombudsman" within CEQ with "decision-making authority to resolve conflicts within the NEPA process." ConocoPhillips Alaska opposes this concept. We are very concerned that creation of an ancillary administrative conflict resolution process will further lengthen the NEPA process. Moreover, it is uncertain what conflicts would be appealable to CEQ, on what record, in what time frame and what standards would apply to CEQ's decision-making. The only things that seems certain about this proposal are the likelihood of encouraging disputes, increasing costs, promoting delay and creating new grounds for litigation.

Recommendation 7.2: ConocoPhillips Alaska supports directing CEQ to propose methods for reducing NEPA-related costs.

Recommendations 8.1 and 8.2: ConocoPhillips Alaska strongly endorses the concept of clarifying the meaning of "cumulative impacts." We concur with Recommendation 8.1 that the lengthy assessment of the "existing environment" in an EIS should be deemed sufficient to address past actions. In addition, we believe additional clarification is warranted to confirm CEQ's current guidance that past actions do not need to be individually identified and their impacts need not be separately parsed. We also concur with Recommendation 8.2 in seeking clarification of what future actions and impacts must be analyzed.

In regard to Recommendation 8.2 we have two additional suggestions. First, the major problem with "cumulative impacts" today is that the concept is subject to an overly expansive interpretation by courts and agencies. Accordingly, amending CEQ regulations to clearly identify the kind of impacts that need *not* be considered in a cumulative impacts analysis, rather than in refining the explanation of what cumulative impacts are, would be of great practical benefit. Second, we commend to the NEPA Task Force the ESA's definition of "cumulative effects." *See* 50 C.F.R. § 402.02. Under the ESA, "cumulative effects" do not include future federal actions or actions requiring federal approval. If and when these actions are proposed, they will receive full ESA review, including a review of cumulative impacts as defined by the ESA. This same concept could be applied to NEPA process, thereby eliminating the current need to speculatively analyze the future effects of possible actions that will be the subject of future NEPA review.

Recommendations 9.1, 9.2 and 9.3: ConocoPhillips Alaska takes no position on the draft recommendations regarding additional studies by CEQ.

II. Alternative Recommendations Supported By The Record

Alternative Recommendation #1:

ConocoPhillips Alaska recommends that the Committee on Resources and the NEPA Task Force consider amending NEPA or its regulations to formally incorporate the concept of an "applicant" that is entitled to specified procedural rights. The applicant concept would, in our view, better encourage reasonable schedule discipline and would provide the individuals and businesses most directly affected by NEPA with formal procedural rights.

Alternative Recommendation 1.1: Amend NEPA (Subchapter III – Miscellaneous Provisions) to create an applicant status and define the term applicant.

> *Applicant* means any person or entity who requires federal approval or authorization from a Federal agency as a prerequisite to conducting an action, and whose request for such federal approval or authorization results in the application of any form of NEPA process.

Alternative Recommendation 1.2: Amend NEPA regulations as follows to (1) provide a regulatory definition of applicant, (2) establish time frames for NEPA process and (3) establish the procedural rights of applicants.

> **40 C.F.R. § 1508.__ Applicant.**
>
> *Applicant* means any person or entity who requires federal approval or authorization from a Federal agency as a prerequisite to conducting an action, and whose request for such federal approval or authorization results in the application of any form of NEPA process. Applicant status shall be determined by the lead agency.
>
> **40 C.F.R. § 1501.8 Time limits.**
>
> [Repeal existing § 1501.8]
>
> The lead agency shall establish time limits for completing the entire NEPA process, and for completing each constituent part of the NEPA process.
>
> (a) Establishing time limits:
>
> (i) The time limits for completing the entire NEPA process shall not exceed 18 months for preparation of an environmental impact statement

and shall not exceed 9 months for preparation of an environmental assessment and issuance of a finding of no significant impact.

(ii) The lead agency may extend the time limits for completing an environmental impact statement by up to 60 days and the time limit for completing an environmental assessment and finding of no significant impact by up to 30 days. If an applicant is involved, the lead agency must provide the applicant with a written statement of the reasons why a longer period is required and the date to which the NEPA process is being extended. The written notice must be provided to the applicant before the close of the applicable time limit set forth in subsection (i). If no applicant is involved, the lead agency, and any cooperating agencies, may mutually agree to extend the NEPA process for a specific time period.

(iii) Except as provided in subsection (ii) above, completion of the entire NEPA process involving an applicant shall not be extended without the written consent of the applicant. Before the close of the applicable time limit set forth in subsection (ii), the lead agency and applicant may mutually agree to extend the time limit for completing the NEPA process. When requesting consent of an applicant, the lead agency shall provide the applicant with a written statement of the reasons why a longer period is needed and proposing a specific time period for the extension. If no extension is agreed to before the close of the applicable time period, the lead agency shall complete the NEPA process and finalize all NEPA documents in accordance with the original time limit.

(b) For each NEPA process, the lead agency shall designate a person (such as the project manager or a person in the agency's office with NEPA responsibilities) to manage the establishment of time limits and to monitor compliance with those limits.

40 C.F.R. § 1501.9 Applicants

Applicants shall:

(a) be permitted to participate in the NEPA process at the earliest possible time,

(b) be afforded the opportunity to work directly with, and submit information and provide comments to, the lead agency, its contractor, if any, and cooperating agencies at all times during the NEPA process,

(c) be consulted in establishing time frames for completion of the entire NEPA process and its constituent parts,

(d) be consulted in controlling costs, and

(e) as provided in § 1508.8(a)(iii), the lead agency shall obtain the consent of applicants for extensions beyond the time limits set forth in § 1508.(a)(ii) .

Rationale: The above proposals would address concerns raised by the Task Force report in Recommendations 1.2, 4.1, and 7.2. The proposed changes would establish a workable basis for schedule discipline patterned after the existing role of applicants in consultations conducted under the ESA. The above proposals would also formalize the role of applicants by assuring full access to and involvement in the NEPA.

Alternative Recommendation #2:

The *NEPA Report* acknowledges that interested parties are not always able to participate as intervenors in NEPA litigation. *NEPA Report* at 12. In the Ninth Circuit, this is a particular problem because courts have repeatedly held that private parties may not intervene in NEPA actions as of right under Federal Rule of Civil Procedure 24(a)(2). *See, e.g., Wetlands Action Network v. U.S. Army Corps of Eng'rs*, 222 F.3d 1105, 1114 (9th Cir. 2000); *Churchill County v. Babbitt*, 150 F.3d 1072, 1082-83 (9th Cir. 1998), *amended* 158 F.3d 491 (9th Cir. 1998); *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1108 (9th Cir. 2002). The Ninth Circuit adheres to this rule even though the interests of applicants, permit holders, and other private parties are often affected by or entirely dependent upon the outcome of the NEPA litigation. *See, e.g., Wetlands*, 222 F.3d at 114 (limiting intervention of developer holding Clean Water Act permit to remedial stage of NEPA lawsuit challenging government's decision to grant that permit); *Churchill*, 150 F.3d at 1082 (denying power utility intervention as of right in NEPA challenge to water rights acquisition plan affecting construction of utility's power plant).

The Ninth Circuit's categorical rule prohibiting nongovernmental parties from intervening as of right has been rejected by other federal circuits for sound reasons. In *Kleissler v. U.S. Forest Service*, for example, the Third Circuit astutely explained that because NEPA suits "frequently pit private, state, and federal interests against each other," the Ninth Circuit's rigid rule "contravene[s] a major premise of intervention—the protection of third parties affected by pending litigation." 157 F.3d 964, 971 (3d Cir. 1998). As the Third Circuit recognizes, NEPA actions can have "an immediate and deleterious effect" on entities and individuals other than the plaintiffs. *Id.*

ConocoPhillips Alaska, therefore, recommends amending NEPA to protect the right of nongovernmental parties to intervene in NEPA lawsuits affecting their interests.

Alternative Recommendation 2.1: Amend NEPA (Subchaper III – Miscellaneous Provisions) to include the following two-part provision:

> (a) An applicant has an unconditional right to intervene in a lawsuit challenging a Federal agency's compliance with the National Environmental Policy Act regarding the applicant's proposed action.
>
> (b) Any individual, corporation, partnership, trust, association, or other private entity is deemed to have a protectable interest sufficient to satisfy the requirements of Federal Rule of Civil Procedure 24(a)(2) for intervention as of right in a lawsuit

> challenging a federal agency's compliance with the National Environmental Policy Act provided that the individual, corporation, partnership, trust, association, or other private entity can demonstrate that its interest is legally cognizable and will be affected by the outcome of the pending litigation.

Rationale: Section (a) of the above provision would make it clear that applicants, whose projects depend upon federal approval or authorization, have an unconditional right to intervene in NEPA actions challenging those decisions. Section (b) would resolve the current circuit split in favor of the majority view that intervention as of right should be granted to parties with a sufficient interest in the outcome of the NEPA litigation. Among other things, this change would apply to parties with an interest in programmatic NEPA processes where there is no applicant. Amending NEPA to create a right of intervention, would also address concerns raised by the Task Force in Recommendation 4.1 that lawsuit settlement discussions involving NEPA review may exclude affected individuals and businesses.

Alternative Recommendation #3:

ConocoPhillips Alaska recommends adoption of a regulation that clarifies the level of project detail required of applicants engaging in a NEPA process.

NEPA process is designed to occur early in the planning process in order to ensure that federal agencies take a hard look at the probable environmental consequences of their decision, and of alternative actions, before commitments are made. *See, e.g.,* 40 C.F.R. § 1501.2(d)(3) (requiring federal agencies to "commence[] its NEPA process at the earliest possible time.") In many instances, for the process to occur before commitments are made, NEPA review must necessarily involve conceptual and planning level information, as opposed to final engineering level detail. This is particularly true in the case of oil and gas development on the North Slope of Alaska where the probable environmental consequences of a proposed action can be reasonably predicted with conceptual level detail based upon similar actions that have already occurred and whose effects have been studied and/or modeling studies.

Our experience, and the experience of other companies operating on the North Slope, is that there is often a disconnect between the level of detail required by the lead agencies and the level of detail seemingly demanded by cooperating agencies. In our experience, some cooperating agencies are taking an increasingly problematic stance by demanding final engineering level details that do not advance actual knowledge of the probable environmental impacts. This problem is exacerbated by the absence of schedule discipline discussed elsewhere in these comments because the objecting agency is able to stall the NEPA process unless its demands are addressed. In our experience, this problem is becoming more common, causes scheduling delays and increased costs, and results in an administrative record that furthers the interests of project opponents.

Alternative Recommendation 3.1: Amend Part 1502 of CEQ's NEPA regulations to clarify that final engineering level detail is not required to complete the NEPA process.

§ 1502.22 Information

(a) The lead agency, in consultation with the applicant and the cooperating agencies, if any, has responsibility for and the discretion to determine the adequacy of the available information. The lead agency shall take into account the importance of conducting the NEPA process as early as possible in the planning of a proposed action. Except as provided in subsection (b), the lead agency shall obtain information sufficient to reasonably identify and analyze the probable environmental impacts of a proposed action. Conceptual design information, combined with information regarding the impacts of similar actions or impacts on similar environments, or modeling studies, may be sufficient. Unless otherwise available, final engineering and permitting details are not required for NEPA process.

(b) [insert the existing text of 1502.22]

Rationale: The above regulatory change would clarify that the responsibility for resolving information needs resides with the lead agency. The proposed change would also confirm that final engineering detail is not required, thereby discouraging extended arguments among agencies and staff that lead to schedule delays, increased costs and the increased risk of litigation.